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No. 98-536

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

TOMMY OLMSTEAD, Commissioner of the Department of Human Resources of the State of Georgia, et al.,

Petitioners,

vs.

L. C. and E. W., each by JONATHAN ZIMRING, as guardian ad litem and next friend,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

AMICUS CURIAE BRIEF OF THE STATES* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The issue presented in this case is whether Title II of the Americans with Disabilities Act, 42 U.S.C. §12131, et seq. (the "ADA"), and the Integration Rule[1] compel the delivery of disability services (*i.e.*, services that are provided only for habilitation and treatment of the disabled, and not to nondisabled persons) in the most integrated community setting available, when such treatment and habilitation can also be provided in an institutional setting. The states have an obvious and compelling interest in this question. All of the states provide services and programs for the treatment and habilitation of individuals with disabilities. This diverse group includes, *inter alia,* those who may be mildly, moderately, severely or profoundly mentally retarded; those who have other menta' or physical disorders; and those requiring treatment for substance abuse.

The states provide treatment and services to individuals with disabilities in both institutional and community-based settings. In addition to hospital-type institutions, states also provide "intermediate" settings at the community level such as nursing homes, assisted living facilities, and Intermediate Care Facilities for the Mentally Retarded (ICF/MR). Representative information for thirteen states is set forth in Appendix A.

The needs of individuals with disabilities vary widely. Some of those who are treatable in a community setting may, nevertheless, require a restrictive and structured placement to accommodate their special needs. Others, who have more medically complex disabilities, will require specialized medical services, specialized medical equipment, and 24-hour nursing services, considerations that make community placement more problematic. Still others may pose serious risks to the community

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[1]This rule is also referred to as the "Integration Mandate." *See* 28 C.F.R. §35.130(d)

because of extreme behavioral problems or even criminal propensities. There are social and political, as well as fiscal, costs involved in community placement for these individuals.

Many of the states are now embroiled in costly and protracted lawsuits that, relying on the Integration Rule's interpretation of the ADA, seek to fundamentally reshape the manner in which services (that are not provided to nondisabled persons) are provided to individuals with disabilities. The overall thrust of this litigation is toward massive deinstitutionalization, regardless of the disruption and regardless of the short-term costs. In many states, a modification in the service delivery system to require the provision of treatment and programs for every disabled individual in the least restrictive setting appropriate to the needs of the individual would require the expenditure of hundreds of millions of dollars, perhaps more. The states' interest in having the question of Congress' intent regarding the Integration Mandate resolved is clearly compelling.

SUMMARY OF ARGUMENT

The states' delivery of treatment, services and programs for individuals with disabilities is a complex and expensive undertaking and one that should be carefully planned. States now face numerous lawsuits, including class actions, asserting that every individual with a disability has a right to be treated in the least restrictive setting, regardless of the cost and regardless of the impact on any state's current structure of institutional, group and community-based facilities. The states' ability to provide services to those with disabilities is undermined by constant litigation to determine every individual's proper placement.

In enacting the ADA, Congress authorized the Department of Justice to adopt implementing regulations consistent with those it had adopted under the Rehabilitation Act. The ADA, however, contains no mandate for deinstitutionalization. Rather, it prohibits

discrimination against an individual on the basis of that person's disability. That is, discrimination between an individual with a disability and the non-disabled. Courts have not recognized that an individual with a disability has a constitutional right to habilitation in the least restrictive environment.

Furthermore, the Rehabilitation Act was not interpreted to require the states to place individuals with disabilities in the least restrictive setting appropriate to the needs of the individual. Hence, it could not have been Congress' intent to mandate the adoption of a new rule by the Department of Justice (or a substantially different new interpretation of an existing rule) requiring the provision of treatment, services and habilitation for every individual with a disability in the most integrated setting.

Finally, principles of federalism require that Congress provide "clear notice" to states in the text of legislation when it imposes obligations upon the states -- such as deinstitutionalization -- that will entail significant costs. The ADA does not meet the requisite clear notice requirement.

ARGUMENT

I. THE ADA AS INTERPRETED BY THE INTEGRATION RULE UNDERMINES THE STATES' ABILITY TO DECIDE THE MOST APPROPRIATE STRUCTURE FOR DELIVERING SERVICES AND PROGRAMS FOR TREATMENT AND HABILITATION OF INDIVIDUALS WITH DISABILITIES AND FOR ALLOCATION OF THE STATES' LIMITED RESOURCES.

The management and delivery of services and programs for the treatment and habilitation of individuals with disabilities is a major, complex and expensive undertaking for every state, but particularly so for those more populous states whose annual

budgets for such services may reach hundreds of millions of dollars. Many states have long relied on institutions as a significant component of their systems for delivering treatment and habilitation services for individuals with disabilities. States such as Michigan and Montana, over time and of their own volition, have moved to predominantly community settings for providing treatment and habilitation services. But none has ever understood that the ADA mandated an immediate transition (or even a transition over time) to a community setting for each and every individual for whom it was a theoretical possibility.

It is, of course, self-evident that if a state expends enough money and provides sufficient equipment and personnel, virtually any person can be served either in an integrated community setting or in his or her own home. Limited fiscal resources restrict the ability of the states to fund community-based placements for all individuals with disabilities. Nevertheless, relying on the Integration Rule, a host of ADA-based claims have been filed throughout the country that attack not only the provision of services in institutions, but also those in less integrated settings like an Intermediate Care Facility for the Mentally Retarded and even nursing homes. Consider the following cases:

A. Florida

Brown v. Chiles, Case No. 98-673-CIV-Ferguson, U.S. District Court, Southern District of Florida, a class action challenging the placement of developmentally disabled persons in the four Developmental Services Institutions (DSIs) owned and operated by the State of Florida. These DSI institutions provide residential treatment and habilitation for approximately 1,400 severely or profoundly retarded and developmentally disabled adults. In demanding the "most integrated placement" for each of these 1,400 individuals along with all necessary support services, plaintiffs effectively seek the closure of the facilities.

Johnson v. Sellars, Case No. 87-369-CIV-T-24, U.S. District Court, Middle District of Florida, a case in which, following the state's settlement with the plaintiff class' challenge to conditions at the G. Pierce Wood Memorial Hospital, a facility for those with mental disorders, the court permitted the Department of Justice to intervene in 1998. The Department asserts, *inter alia*, that the patients at the hospital are not receiving services in the most integrated setting appropriate to their needs. This suit also effectively seeks closure of the facility.

B. Texas

Damian M. v. Gilbert, Case No. CA-H-98-3702, U. S. District Court, South District, Houston Division, a case in which the plaintiff, a resident of a private ICF/MR, seeks services at home. The program has a waiting list and plaintiff is ranked 460 on that list. Plaintiff asserts the ADA mandates the most integrated setting possible--in his case, at home.

Charles M. v. Gilbert, Case No. SA-98-CA-0676-DWS, U. S. District Court, a case challenging the denial of home and community-based services. The denial was predicated on a determination that such services would exceed the cost of nursing home care.

C. New York

Best v. DeBuono, Case No. 98-404648, Supreme Court, New York County; *Jackson v. DeBuono,* Case No. 98-402855, Supreme Court, New York County; *Rivera v. DeBuono,* Case No. 98-402685, Supreme Court, New York County; *Rubin v. DeBuono,* Case No. 98-402767, Supreme Court, New York County; *Sanon v. DeBuono,* Case No. 98-403296.

These cases concern Medicaid recipients applying for or receiving personal care services. If the home care costs exceed 90 percent of nursing facility costs, the recipient, if not meeting any

exception, must be referred for nursing facility placement or other appropriate placement. Plaintiffs assert this policy violates the ADA.

Additionally, another case is pending in New York involving "safety monitoring"services, *Rodriguez v. DeBuono*, Case Number 97-CIV-0700(SAS), currently pending in the Southern District of New York. In these cases, it is contended that New York must provide "safety monitoring" as part of the home-based personal care services program for those recipients who are cognitively impaired. New York contends that the personal care services program is only to provide hands-on assistance with specific tasks and that it would alter the essential nature of the program if the state had to provide safety monitoring when no other personal care service is being provided.

D. Maryland

Williams v. Wasserman, 937 F.Supp. 524, 526 (D.Md. 1996). Nine plaintiffs, described as "traumatically brain injured" and developmentally disabled, brought claims on behalf of a class alleging that the failure of the state to provide community-based rather than institutional care violated the integration mandate. On summary judgment motions, the court concluded that requiring the state to provide community placements was a "reasonable accommodation" to their disability. Factual issues remained which precluded summary judgment.

E. Montana

Travis D. v. Eastmont Human Services Center, U. S. District Court, District of Montana, Case No. CV-96-63-H-CCL. In this case, the plaintiffs seek to require Montana to evaluate each person with developmental disabilities being served or at risk of commitment to Montana's two state-operated ICF/MRs and to provide services in community settings to any who could be

appropriately served in such settings, even if this means creating new or expanding existing community services.

Montana presently has about 120-125 individuals who are served in ICF/MRs. This population requires a high level of well-coordinated services that are much more expensive to provide than those available in the community to individuals whose needs are not so complex. Plaintiffs have presented a "functional twin" argument--that there are other individuals requiring approximately the same configurations of services who are being cared for in the community. Therefore, it is contended, Montana is capable of providing such services, and it would not cause a fundamental or substantial alteration to the service system to require Montana to develop additional similar placements.

* * *

The impetus for the above suits was *Helen L. v. Didario*, 46 F.3d 325 (3rd Cir. 1995), *cert. den. sub nom. Pennsylvania Secretary of Public Welfare v. Idell S.*, 511 U.S. 813 (1995), as extended by the court of appeals' decision in the instant case, *L.C. v. Olmstead*, 138 F.3d 893 (11th Cir. 1998). Both purport to deny that their rulings mandate the deinstitutionalization of individuals with disabilities. *See Helen L.*, 46 F.3d at 336, and *Olmstead*, 138 F.3d at 902. In *Helen L.*, the plaintiff, who was partially paralyzed and in a nursing home, sought the provision of state services at home. As a defense, the state contended not that home-based provision of services was more expensive or even that it lacked funds, but simply that it could not shift funds from a nursing care appropriation to the attendant care category. The court held that the plaintiff's request was not unreasonable and noted that it would save the state an average of $34,500 per year. *Olmstead* significantly extended that ruling, rejecting Georgia's contention that it lacked funding and holding that a state could justify its failure to provide treatment to individuals in the most integrated setting only if the accommodation "would

fundamentally alter the nature of the [state's] service [or] program . . . " *See* 138 F.3d at 902 and 904.

If this is true for plaintiffs in the singular, as in *Olmstead*, it logically follows that it is true in the aggregate. Indeed, *Brown v. Chiles*, *supra*, and *Johnson v. Sellars*, *supra*, reflect a strategy of seeking deinstitutionalization through class actions challenging institutional placements. Piecemeal litigation rather than planning may now determine the manner in which services will be provided to individuals with disabilities.

The court of appeals in *Olmstead* gave very little guidance as to what would constitute a "fundamental alteration" in the services a state provides. It appears that a state must absorb both the fixed overhead costs necessary to maintain its institutional facilities *and* fund the extra costs of community or home-based treatment until some unknown point at which there is a "fundamental alteration" to its programs. *Olmstead*, 138 F.3d at 905. The difficulty the court of appeals had in its terse discussion of this issue, *see id.*, at 905 and n. 10, pointedly underscores the fact that the "fundamental alteration" standard provides no criterion at all by which a state can, with some degree of intelligent foresight, plan and fund the services it will provide to individuals with disabilities.

The ADA and the Integration Mandate should not be used to deprive the states of the right to make their own considered plans for the structuring of treatment and habilitation services for individuals with disabilities, particularly regarding the appropriate mix of institutional, group and community-based settings. Given its generality of expression, the mandate has no logical or discernible point of attenuation. It necessarily invites never-ending litigation by individuals to determine the "least restrictive" placements and to obtain the services to go with them, even if the state has decided that those services should be provided in institutional or group settings.

If institutions begin to empty, the facility-based reimbursement schemes in place nationwide will be undermined because of the resultant diseconomies of scale. These institutions typically are reimbursed based on a daily bed rate, and to provide the best services must operate at capacity. The per capita daily rate will certainly rise as the cost is spread over a decreasing population.[2] Hence, a reduction in the quality of services provided can be anticipated. Moreover, the compelled creation of new community placements hurriedly planned will engender its own set of problems. Ultimately, states will have to decide whether in the face of limited resources they can serve only the most severely disabled.

It is submitted that nothing in the ADA or its history reflects that Congress intended to usurp the states' prerogative to make these fundamental policy decisions themselves. To the contrary, Congress' mandate, as shown *infra*, was much more limited.

II. THE COURT OF APPEALS MISINTERPRETED CONGRESS' INTENT AS STATED IN THE ADA.

When it enacted the ADA, Congress stated that the Attorney General was to promulgate regulations implementing the ADA, and that

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[2] See, e.g., David Braddock et al., *The State of the States in Developmental Disabilities: Summary of the Study* (5th ed.) at p. 27, where the authors note that although institutional populations were continuing to decline:

> Aggregate staffing of institutions has declined substantially but less rapidly than the residential census. As a result, *average daily costs have risen substantially*....

(emphasis added).

> [w]ith respect to "program accessibility, existing facilities," and "communications," such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29 [the Rehabilitation Act].

42 U.S.C. §12134(b). Thus, Congress required the Department of Justice to adopt regulations consistent with those the Department had promulgated when implementing the Rehabilitation Act. One of the rules implementing the Rehabilitation Act, known as the "integration regulation," provided that "[t]he agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." *See* 28 C.F.R. § 39.130(d).

In accordance with Congress's mandate in 42 U.S.C. § 12134(b) that it promulgate regulations implementing the ADA that were consistent with its existing regulations implementing the Rehabilitation Act, the Department adopted a nearly identical integration rule:

> A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

See 28 C.F.R. § 35.130(d). The court of appeals concluded that because the Department has interpreted this regulation as requiring the states to place institutionalized individuals with disabilities in "the most integrated setting appropriate" to the needs of each individual, the ADA requires such placement, even if facilities for that placement do not presently exist, and even though the states do not provide similar services to individuals without disabilities.

The court of appeals' decision on this point was incorrect. Even if the Department interprets the regulation as requiring the states to place individuals with disabilities in the most integrated setting possible, regardless of whether the states currently provide such services to non-disabled individuals, that interpretation is not binding on the courts if Congress has otherwise expressed its intent on the question. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 117 S.Ct. 1491, 1500 (1997) (citation omitted) (holding that "[a]lthough we normally accord the Attorney General's construction of the Voting Rights Act great deference, 'we only do so if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable'"). *Cf. also Miller v. Johnson*, 515 U.S. 900, 923 (1995) (citations omitted) (stating that "[a]lthough we have deferred to the Department's interpretation in certain statutory cases, . . . we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions"). Thus, if Congress has indicated that it did *not* intend to require the states to provide treatment to disabled persons in the "most integrated setting" appropriate for each individual disabled person, then this Court must reject the Department's construction of the integration regulation.

A. Title II of the ADA Bars Only Discrimination Based on Disability.

In enacting Title II of the ADA, Congress stated that:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (emphasis added).

Congress thus enacted the ADA in order to prohibit the states from denying to disabled persons, because of their disabilities, the services and benefits provided to and enjoyed by those without disabilities. *See, e.g., Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015-1016 (6th Cir. 1997) (en banc) (holding that "the ADA does not mandate equality between individuals with different disabilities. Rather, the ADA prohibits discrimination between the disabled and the non-disabled."), *cert. denied*, ___ U.S. ___, 118 S.Ct. 871 (1998); *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 384 (2d Cir.1996) (holding that when it enacted the ADA, "Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons."); *Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996) (citation omitted) (holding that "nothing in the Act [ADA], its purpose, or the regulations can reasonably be read to give disabled parkers access to areas that would not be available to them if they were not disabled. The purpose of the Act is to place those with disabilities on an equal footing, not to give them an unfair advantage."). *Cf. also Alexander v. Choate*, 469 U.S. 287, 304 (1985) (stating that the Rehabilitation Act "seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance").[3] However, the ADA does *not* require the states to treat all disabled persons in the same manner. *Cf. Traynor v. Turnage*, 485 U.S. 535, 548, 108 S.Ct. 1372, 1382, 99 L.Ed. 2d 618 (1988) (holding that "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons").

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[3]*See, e.g., McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997) (acknowledging that "[i]t is well-established that the two statutes [the ADA and the Rehabilitation Act] are quite similar in purpose and scope"); *Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997) (holding that "[b]ecause the standards under both [the ADA and the Rehabilitation Act] are largely the same, cases construing one statute are instructive in construing the other").

Where an individual with a disability seeks services not available to those who have no disabilities, it cannot be said that the denial of such services in the most integrated setting is by reason of disability. Nevertheless, the court of appeals construed the ADA and the integration regulation to require the states to provide the "most integrated" treatment appropriate for each disabled individual *even if a state does not provide such services for non-disabled persons*. This construction, requiring a comparison of individuals with disabilities only against other disabled persons to determine whether people suffering from similar disabilities are being treated the same, and prohibiting dissimilar treatment, is contrary to Congress' stated intention of prohibiting the states from discriminating against disabled persons by denying them services provided to non-disabled persons. This Court is therefore not bound by the Department's construction of the regulation.[4] *Reno v. Bossier Parish Sch. Bd., supra.*

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[4]To the extent that the court of appeals determined that institutionalization is a form of discrimination, it is also worth noting that all of the courts that have addressed the issue have held that the Constitution does *not* guarantee a mentally retarded person the right to the community placement of his choice or in the least restrictive environment. *See, e.g., P.C. v. McLaughlin*, 913 F.2d 1033, 1042 (2d Cir. 1990); *Lelsz v. Kavanagh*, 807 F.2d 1243, 1251 (5th Cir. 1987) (holding that "the federal constitution does not confer on [class of mentally disabled individuals] a right to habilitation in the least restrictive environment"); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984) (holding that there is no entitlement to community placement or a "least restrictive environment" for mentally retarded persons under the federal constitution). To the extent a mentally retarded person is now guaranteed the right to live in the least restrictive environment, the states have been required to do more than the Constitution itself requires. Such an interpretation of the ADA brings that Act into tension with the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress may abrogate the states' Eleventh Amendment immunity from suit in federal court only through a valid exercise of its section 5 power to enforce the Fourteenth Amendment). Thus, although the question of whether Congress exceeded its section 5 power to enforce the Fourteenth Amendment when it enacted Title II of the ADA is not before the Court, the ruling below "raise[s] serious constitutional questions." *See Miller v. Johnson, supra*, 515 U.S. at 926, 115 S.Ct. at 2493 (rejecting Justice Department's interpretation of a portion of the Voting Rights Act where the

B. The Integration Rule Implementing The Rehabilitation Act Did Not Require The States To Place Handicapped Individuals In The Most Integrated Setting Appropriate To Their Needs.

When it enacted the ADA, Congress expressly required the Department to promulgate regulations that *were consistent with its existing regulations implementing the Rehabilitation Act*. *See* 42 U.S.C.§ 12134(b). The Department was authorized to do no more than readopt the preexisting regulation that it had promulgated under the Rehabilitation Act. In reality, then, it was the integration regulation of the Rehabilitation Act that Congress gave the "force of law" when it enacted the ADA. The meaning of that regulation is controlling here. *See Bragdon v. Abbott*, 118 S.Ct. 2196, 2208 (1998) ("Had Congress done nothing more than copy the Rehabilitation Act definition into the ADA, its action would indicate the new statute should be construed in light of this unwavering line of administrative and judicial interpretation"). Accordingly, the crucial question is whether the integration regulation set forth in 28 C.F.R. § 39.130(d) (under the Rehabilitation Act) was interpreted, *prior to Congress's enactment of the ADA*, to require the states to provide treatment to individuals with disabilities in the most integrated setting appropriate to the individual, regardless of whether such a setting existed.

Prior to Congress' enactment of the ADA, the courts had consistently held that the Rehabilitation Act did *not* require the states to place handicapped persons in the least restrictive setting appropriate to the individual. *See, e.g., P.C. v. McLaughlin*, 913 F.2d 1033, 1041 (2nd Cir. 1990)) (holding that the Rehabilitation

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Department's "implicit command that States engage in presumptive unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment . . . into tension with the Fourteenth Amendment").

Act "does not require all handicapped persons to be provided with identical benefits," and that the Act "did not clearly establish an obligation to meet P.C.'s particular needs vis-a-vis the needs of other handicapped individuals, *but mandated only that services provided nonhandicapped individuals not be denied P.C. because he is handicapped"*) (emphasis added); *Phillips v. Thompson*, 715 F.2d 365, 368 (7th Cir. 1983) (rejecting appellants' argument that the state had the affirmative duty under the Rehabilitation Act "to create less restrictive community residential settings for them," and holding that because "there is no contention that these class members, *because of their handicap*, are being denied access to community residential living that Illinois is affording to others," the Rehabilitation Act "simply has no application to appellants' claim") (emphasis added). The Rehabilitation Act therefore was never interpreted to require placement of handicapped individuals in the most integrated setting appropriate for the individual, despite the existence of the integration regulation within the regulations implementing the Act. Thus, because it was this interpretation of the Rehabilitation Act and its integration regulation which Congress approved and gave the force of law when it enacted the ADA, the court of appeals clearly erred when it overlooked the prior regulation, and instead concluded that it was "bound" by the Department's current construction of the ADA's integration regulation. *See United States v. Board of Comm'rs of Sheffield*, 435 U.S. 110, 134 (1978) (citations omitted) (holding that "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby").

In addition, Congress knows very well how to enact an explicit integration mandate that imposes new and affirmative obligations, and it did so in Title III of the ADA. See 42 U.S.C. § 12182 (b)(1) (B). Had it intended to go beyond the requirement of the previously adopted rule and the courts' construction of the Rehabilitation Act, it could easily have declared its intent to do so.

In sum, the court of appeals' determination that the ADA requires the states to place individuals with disabilities in the most integrated setting appropriate for their needs runs directly contrary to Congress' stated intent. Again, the court of appeals held that the integration regulation requires the states to provide the most integrated treatment setting appropriate for a particular disabled individual *even if a program providing such a setting is not currently available to anyone, disabled or non-disabled.* Obviously, if a state does not provide such a service to non-disabled persons, then the individual with a disability seeking that service is *not* being denied the service because of his or her disability. The state's denial of that service therefore does not violate the ADA. Furthermore, to the extent that it requires the states to provide the "most integrated treatment" to *all* individuals with disabilities because it is able to provide such treatment to *some* of them, the ruling below is contrary to Congress's intent because the ADA simply does not require the states to treat all individuals with disabilities in the same manner. This Court therefore should reverse the determination that the ADA requires the states to create facilities and programs which provide the "most integrated treatment" appropriate for every individual with a disability.

III. THE ADA CANNOT BE CONSTRUED TO IMPOSE FINANCIAL BURDENS UPON THE STATES IN THE ABSENCE OF CONGRESS' CLEARLY STATED INTENT.

In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), this Court refused to construe the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 et seq., as creating a substantive right in favor of the mentally retarded to appropriate treatment in the least restrictive environment. This Court found no clearly stated intent on the part of Congress to impose such an obligation on the states pursuant to its authority to enforce the Fourteenth Amendment or its authority under the Spending Clause to condition the states' receipt of

federal funds under the Act. Rather, in view of the nominal amount of funding available to Pennsylvania under the Act, the Court found that "it defied common sense . . . to suppose that Congress *implicitly* imposed this massive obligation on participating States." *Id.* at 24 (emphasis added). Had it intended to impose such massive burdens, Congress was obligated to provide "clear notice" to the states in the terms of the Act so that any state deciding to participate could make an informed choice whether to do so. *Id.*

The ADA fails to provide clear notice of Congress' intent to mandate that all services provided by the states to individuals with disabilities be provided in the least restrictive or "most integrated" setting for every individual for whom it is theoretically appropriate. Such a mandate would effectively obligate states to conduct an individualized review of each person being treated in an institution to determine whether he or she can be treated in the community; and to create or expand facilities for community-based placements, with the concomitant need to close institutions when provision of services in that setting is no longer economically feasible. At the time the Rehabilitation Act (and the ADA) was passed, there were innumerable institutional facilities, a fact certainly well known to Congress. If Congress intended that all services and programs for individuals with disabilities be provided in the least restrictive setting and institutional facilities phased out, *Pennhurst* requires that intention be clearly stated in the text of the legislation.

If, as a rule of statutory construction, this Court holds that Congress must clearly express its intent to impose conditions on the grant of federal funds to the States, it is all the more imperative to rigorously apply this interpretive rule to legislation that imposes massive obligations *without* funding assistance and that the states

have no choice but to accept.[5] In this circumstance it is not the states' right to make an informed decision that is imperilled, but their far more fundamental right and ability to participate effectively in the political process. Congress should not be permitted to bury invisible landmines in legislation that later explode to the devastation of a state's fisc. Such a practice is intolerable in a system of dual sovereigns. It is every bit as important to concerns of federalism that notice of such an obligation be as clearly stated in legislation as notice of Congress' intent to abrogate the states' sovereign immunity under the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (Congress' intent to abrogate the Eleventh Amendment must be "unmistakably clear in the language of the statute"). The ADA plainly does not meet the clear notice standard.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, and the matter should be remanded to the district court with instructions to dismiss the action below.

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[5] Of course, unless Congress is *properly* enforcing the Fourteenth Amendment, it cannot impose such obligations upon the states without running afoul of the Tenth Amendment. *See New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 117 S.Ct. 2365 (1996).

Respectfully submitted,

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Appendix A[1]

State	Institution	ICF/MR	Community Based Care
Florida	4 developmental services institutions (combined census is approximately 1,415)	private ICF/MRs (combined census is approximately 2,037)	serving approximately 13,136 persons
Georgia	1 developmental services institution and 4 regional facilities for various consumers (combined census for DD/MR is approximately 1660)	1 private ICF/MR (census is approximately 110)	serving approximately 25,143 persons
Iowa	2 hospital schools (combined census is approximately 670)	2,566 bed total	Yes - number unknown

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[1]/This chart reflects only the Developmentally Disabled populations in the referenced states, and does not include any data relating to individuals with other disabilities, including persons suffering from mental illness.

State	Institution	ICF/MR	Community Based Care
Louisiana	3 residential centers (combined actual census of 1,746)	none	none
Michigan	2 institutions (combined census is approximately 278)	No private ICF/MRs	Adult Foster Care (approximately 2,521 beds)
New Mexico	None	combined census is approximately 275	serving approximately 2,250 persons
Montana	2 facilities (combined census is approximately 123)	census is approximately 8	100-150 served in "personal care facilities" approximately 3,472 persons in remaining census
Nevada	2 institutions (combined census is 166)	ICF/MR (combined census 817 & represents service to 21% of DD population) *number of nursing home and ALF beds unknown*	Yes (represents service to approximately 79% of DD population)

State	Institution	ICF/MR	Community Based Care
New Jersey	7 institutions (combined census approximately 3,787)	Unknown at time of publishing	Unknown at time of publishing
New York	11 MR Institutions (combined census approximately 2,388)	Unknown at time of publishing	30,000 persons
North Carolina	5 mental retardation centers (combined census 2,131 persons)	4,000 bed total (represents half of the developmental services population)	Approximately 2,000 persons
Utah	1 public ICF/MR (390 beds, 255 census)	13 private ICF/MRs (combined census 575)	Approximately 3,365 persons
Texas	13 state schools (combined census approximately 5,332)	14,152 bed total	Yes - but limited capacity